IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NAVIN BAROT,	:	Electronically Filed
Plaintiff	:	
v.	:	
	:	No. 4:14-CV-00673
SUSQUEHANNA PHYSICIAN	:	
SERVICES d/b/a Susquehanna Health	:	
Medical Group, DIVINE	:	(Judge Brann)
PROVIDENCE HOSPITAL OF	:	
THE SISTERS OF CHRISTIAN	:	
CHARITY, SUSQUEHANNA	:	Complaint Filed: April 8, 2014
HEALTH SYSTEM, and	:	
SUSQUEHANNA PHYSICIAN	:	JURY TRIAL DEMANDED
SERVICES,	:	
Defendants	:	

DEFENDANTS' STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE

Defendants Susquehanna Physician Services d/b/a Susquehanna Health Medical Group, Divine Providence Hospital of the Sisters of Christian Charity, Susquehanna Health System, and Susquehanna Physician Services in support of their motion for summary judgment, present the following Statement of Material Facts not in Dispute. Defendants submit to the Court that there is no genuine issue to be tried relative to the facts stated below.

1. Plaintiff worked for defendant Susquehanna Physician Services d/b/a Susquehanna Health Medical Group ("SPS" or "SHMG") as a gastroenterologist from July 27, 2009 to May 15, 2011. (Doc. 1).

2. SPS d/b/a SHMG is a 501(c)(3) non-profit corporation. (Appendix, Exhibit 1.1, p. 9).[1]

3. Defendants Divine Providence Hospital ("DPH") and SPS d/b/a SHMG are separate corporate entities and defendant Susquehanna Health System is their sole member ("SHS"). (Appendix, Exhibit 1, June 24, 2015, pp. 9-10).

4. SHMG employs physicians to work at SHS. (Appendix, Exhibit 1, June 24, 2015, p. 9).

5. In 2009, SHMG started a new hospital-based gastroenterology ("GI") practice, and it intended ultimately to hire two gastroenterologists to work for that practice. (Appendix, Exhibit 2, pp. 10-11, 95; Exhibit 1, June 24, 2015, pp. 21-22, 85).

6. Jim Turri, the Senior Vice President and COO of SHMG, recruited plaintiff to be the first gastroenterologist. (Appendix, Exhibit 2, pp. 7-9; Exhibit 3).

7. Plaintiff, however, did not want SHMG to recruit a second gastroenterologist. (Exhibit 2, pp. 17-18; Exhibit 2-A).

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[1] References to exhibits are to the Appendix filed simultaneously herewith.

SHMG EMPLOYMENT AGREEMENT

8. Plaintiff negotiated the terms of the Susquehanna Health Medical Group Physician Employment Agreement with SHMG, which was executed and entered into by the parties on May 18, 2009. ("Employment Agreement"). (Appendix, Exhibit 4, pp. 58, 73- 74).

9. The Employment Agreement covered plaintiff's services as a physician for SHMG.

10. On May 18, 2009, plaintiff also entered into a separate contract with SHS, titled Susquehanna Health System Medical Director of the Gastroenterology Program, to serve as the Medical Director of DPH ("Medical Director Contract"). (Appendix, Exhibit 4, pp. 58, 92-95; Exhibit 4-A).

11. The Medical Director contract covered plaintiff's services as an administrator of sorts for DPH.

12. Plaintiff commenced his employment with SHMG and was appointed as the medical director of DPH on July 27, 2009.

Negotiation of the Employment Agreement

13. Plaintiff was represented by legal counsel during the negotiation of the Employment Agreement. (Appendix, Exhibit 4, pp. 76, 91).

14. Plaintiff was also represented by Scott DeMint, a C.P.A. and practice specialist with extensive experience in analyzing physician compensation agreements during the negotiation of the Employment Agreement. (Appendix, Exhibit 4, pp. 91, 274-275; Exhibit 4-B).

15. Jim Turri negotiated the Employment Agreement on behalf of SHMG. (Appendix, Exhibit 2, p. 16).

16. Plaintiff spoke with Turri, Dr. McCauley, and Mike Rupert at various times during the negotiation stage of the Employment Agreement.

17. Most of his conversations regarding the Employment Agreement were with Turri. (Appendix, Exhibit 4, pp. 279-281).

18. Turri and plaintiff negotiated specific terms of the contract. (Appendix, Exhibit 2, p. 21).

19. On March 25, 2009, Turri sent a letter to plaintiff that highlighted the legal importance of SHMG not paying physicians over the 90th MGMA percentile, which proposed relative contract language. (Appendix, Exhibit 2, pp. 24-25; Exhibit 2-B).

20. As a result of the ongoing and further contract negotiations, the language proposed in the March 25, 2009 letter by Turri was modified to include language that would allow plaintiff to request compensation above the 90th MGMA percentile, with that request being directed to the Compensation Committee for

consideration and possible approval. (Appendix, Exhibit 2, pp. 29-30; Exhibit 2-B, Exhibit 2C, D-4).

21. A document titled "Gastrointestinal Relative Value Units 2007" was provided to plaintiff to show him examples of commonly used billable Current Procedural Terminology ("CPT") codes in gastroenterology and their respective Relative Value Units ("RVU") value. (Appendix, Exhibit 2, p. 31; Exhibit 2-C, D-15).

22. The Gastrointestinal Relative Value Units 2007 Document was not the product of negotiation. (Appendix, Exhibit 2, p. 30; Exhibit 2-C, D-15).

23. Turri sent the Gastrointestinal Relative Value Units 2007 Document to plaintiff and told him that he could attach it to his Employment Agreement. (Appendix, Exhibit 2, pp. 61-62; Exhibit 2-C, D-15).

24. The document is not referenced anywhere in the Employment Agreement, nor is there any language regarding what was required for the CPT codes to be counted as Work Relative Value Units ("WRVU") for the purpose of determining the plaintiff's incentive compensation.

25. WRVUs calculations are set by Medicare, and thus Medicare's regulations apply to determine if the procedure was performed and how much work was done. (Appendix, Exhibit 1, June 24, 2015, p. 38).

26. Plaintiff's consultant, Scott DeMint, told plaintiff on April 1, 2009 that the language in the Employment Agreement could prevent him from being paid above the MGMA 90th percentile and that paying above the 90th percentile would create a legal concern for SHMG. (Appendix, 4B, D-81-D-83).

27. Plaintiff specifically asked Scott DeMint what the Compensation Committee was and if it could deny him compensation and Mr. DeMint responded by stating:

> "Based upon the employment language, it sounds unlikely that [SHMG] will be comfortable compensating you above the 90th percentile under normal circumstances.
>
> Physician compensation committees at most health systems are usually comprised of members of the organization Board as well as health system Administrators and legal counsel. Occasionally, one or more physicians are included but not always. **Per your contract, they can definitely prevent you from making more than the $783,737. Even if they were willing to pay you more, they are going to very concerned legally about falling outside of the 90th percentile as defined by MGMA standards unless they can find a reasonable excuse to do so."** (Appendix, 4-B, D-81-D-83) (emphasis added).

28. On April 2, 2009, plaintiff forwarded DeMint's analysis of SHMG's compensation proposal to Turri, and Turri responded to DeMint's comments stating that if the plaintiff's incentive compensation exceeds the 90th percentile it will be presented to the Compensation Committee for approval. (Appendix, Exhibit 2, pp. 39-41; Exhibit 4B, D-80).

29. Turri also told plaintiff in the April 2, 2009 email that he receives RVU credit for what is billed. (Appendix, Exhibit 4B, D-80).

30. On April 29, 2009, Turri sent an email titled "Last Straw" to plaintiff that stated:

> "Most importantly we cannot pay over the MGMA 90th percentile without RVU productivity justification and our board committee approval…our legal guys will make sure that this is in the contract and as long as your producing, the Committee will approve the payment." (Appendix, Exhibit 4, pp. 285-286; Exhibit 2, pp. 47-48; Exhibit 2-D).

31. On May 13, 2009, Turri told plaintiff that they "can work out the details on the WRVU values based on how and how much [SHMG] can bill." (Appendix, Exhibit 4, p. 286; Exhibit 4-C).

32. Plaintiff executed the Employment Agreement on May 18, 2009. (Appendix, 2-C).

33. Steve Johnson, as Chairman of the Board of SHMG, executed the Employment Agreement on May 18, 2009. (Appendix, Exhibit 1, June 24, 2015, p. 18; 2-C, D-14)

34. Plaintiff admitted that he was not satisfied with the terms in the Employment Agreement at the time that he signed the contract, because it did not contain an agreement that he would receive RVU credit and incentive compensation for the CPT codes that are in dispute. (Appendix, Exhibit 4, pp. 282-283).

35. Jim Turri did not negotiate the separate Medical Director Contract that plaintiff entered into with SHS. (Appendix, Exhibit 2, p. 16).

36. The Employment Agreement was signed on May 18, 2009. (Appendix, Exhibit 2-C).

37. It was for a five-year term that commenced on July 27, 2009. (Appendix, Exhibit 4, pp. 73- 74, 94; Exhibit 2-C).

38. The language in paragraph four states that WRVUs are "defined by the Centers for Medicare and Medicaid Services ("CMS") in the Physician's practice in the prior contract year." (Appendix, Exhibit 2-C, D-3).

39. The language in paragraph six and seven of the Employment Agreement were negotiated between the parties, and plaintiff read paragraph seven before he signed the contract. (Appendix, Exhibit 4, pp. 75-76, 78).

40. Paragraph six of the Employment Agreement states that if the physician's WRVU's at the end of the contract year exceed 10,000 WRVU's, the physician shall receive Additional Compensation, subject to the limitation set forth in Section 7 below. (Appendix 2-C, D-4).

41. Paragraph seven of the Employment Agreement states:

> The total amount of Base Salary plus Incentive and Quality Bonus Compensation payable by SHMG to Physician in any year of this Agreement shall not exceed the 90th percentile of the most recently available comparable Compensation Survey published by the Medical Group Management Association for physicians in the same specialty as Physician. If Physician's

> productivity, expertise and overall job performance suggests that his compensation should exceed the 90th percentile compensation limitation set forth herein, it will be presented to the Compensation Committee of the SHMG Board of Directors for consideration and a determination in accordance with SHMG policy and procedure. However, Physician's total compensation shall not exceed such amount as would constitute reasonable compensation when paid by an organization, such as SHMG, which is tax-exempt organization under Section 501(c)(3) of the Code.

(Appendix, Exhibit 4, p. 79; Exhibit 2-C, D-4-D-5).

42. Susquehanna Medical Group Employed Physician Compensation is a written policy that is referred to in the Employment Agreement. (Appendix, Exhibit 1, June 24, 2015, pp. 57-59; Exhibit 1-A).

43. The Physician Compensation Plan impacted the Employment Agreement and the operations of the Compensation Committee. (Appendix, Exhibit 1, June 24, 2015, p. 59; Exhibit 1-B, D-26).

44. The Physician Compensation Plan states under its procedures for determining the WRVUs for services performed by a physician under a WRVU incentive compensation plan that the "calculation of WRVU's shall not include any WRVU's that are required by Medicare to be bundled into higher value WRVU's." (Appendix, Exhibit 1-B, D-35).

45. Paragraph nine states that the "physician accepts responsibility for coding and appropriate corresponding documentation and shall not transfer this responsibility to any other personnel." (Appendix, Exhibit 4, p. 80; Exhibit 2-C-7).

46. Paragraph 16, section C, of the Employment Agreement states that the "physician shall at all times be responsible to code all billing appropriately in accordance with state and federal law and third-party payor procedure." (Appendix, Exhibit 4, p. 85; Exhibit 2-C, D-9).

47. Paragraph 19 of the Employment Agreement contains a Termination provision that requires 90 days' notice for a party to terminate the agreement voluntarily. (Appendix, Exhibit 4, p. 86; Exhibit 2-C, D-10).

48. The Termination provision of paragraph 19 also states: "[E]ither party may terminate this agreement for a material breach of the agreement by the other party or a failure to fulfill the material terms of this agreement. . ." and that "the non-breaching party shall give the breaching party written notice specifying the default along with notice to terminate within 30 days" and the "breaching party shall have thirty (30) days to cure the default." (Appendix, Exhibit 4, pp. 87-88; Exhibit 2-C, D-11-D-12).

49. The Employment Agreement also contains a severance provision at paragraph 20. (Exhibit 4, p. 88; Exhibit 2-C, D-11).

50. Paragraph 26, is an integration clause that states: "Entire Agreement. This Agreement represents the entire Agreement between the parties and supersedes all previous written or verbal understandings." (Appendix Exhibit 4, p. 90; Exhibit 2-C, D-13).

Susquehanna Health System Medical Director
of the Gastroenterology Program Contract

51. The Medical Director Contract was a three-year contract that commenced on July 27, 2009. (Appendix, Exhibit 4-A).

52. The Medical Director Contract appointed the plaintiff as medical director of DPH. (Appendix, Exhibit 5, p. 13; Exhibit 4-A).

53. Paragraph 9 of the Medical Director Contract contains an integration clause stating that "this agreement represents the entire agreement between the parties and supersedes all prior written and verbal understandings." (Appendix, Exhibit 4, p. 98; Exhibit 4-A, D-4964).

54. Paragraph 7 states that the agreement is "terminable at will by either party upon service of written notification of intent to terminate not fewer than ninety (90) days prior to the effective date of termination. (Appendix, Exhibit 4, p. 98; Exhibit 4-A, D-4964).

Plaintiff's Employment and Performance

55. Practice reviews were held with Dr. Barot throughout the period of his employment. (Appendix, Exhibit 4, pp. 287-288).

56. As early as October 13, 2009, Dr. McCauley, the President and CEO of SHMG, met with the plaintiff to discuss reports of unsatisfied patients and complaints from referring physicians. (Appendix, Exhibit 4, pg. 288, Exhibit 4-D).

57. Lori Beucler and Tina Carter, on behalf of SHS, held an endoscopy meeting with the SHS endoscopy staff on January 7, 2010. (Appendix, Exhibit 6, p. 89).

58. The endoscopy staff discussed concerns regarding the plaintiff's behavior and practice patterns, which included problems with his documentation and regard for patient safety. (Appendix, Exhibit 6-A).

59. Dr. McCauley, Sue Duchman, and George Manchester met on February 10, 2010, to discuss ongoing issues with the plaintiff's performance as medical director of DPH, which included his failure to submit time logs. (Appendix Exhibit 3, Exhibit 3-A).

60. A meeting was held on March 12, 2010, to discuss plaintiff's insufficient and/or inappropriate rendering of care. (Appendix, Exhibit 3-B).

61. At plaintiff's April 13, 2010 practice review, Jim Turri explained the process of seeking approval from the Compensation Committee to pay compensation in excess of the 90th percentile. (Appendix, Exhibit 2-F).

62. At that practice review meeting, a subject of discussions was that there could be an issue with the compensation that the plaintiff was seeking for conscious sedation because there is no reimbursement to the medical group from insurance payers. (Appendix, Exhibit 4, pp. 304-307; Exhibit 2, pp. 77-78; Exhibit 2-E).

63. Lori Beucler continued to have problems with plaintiff in April, 2010. (Appendix, Exhibit 6-B).

64. At the May 14, 2010 meeting Dr. McCauley stated that he was not sure if the Compensation Committee would approve paying the plaintiff above the 90th percentile.

65. Plaintiff responded to Dr. McCauley's concern that "if working and not getting paid, I don't know about that…I do not have the skills to interpret this; it will be left up to the attorneys…when I finish the quota of work you assigned me to, should I take a vacation[?]" (Appendix, Exhibit 4, pp. 316-317; Exhibit 3, Exhibit 7-A).

66. Turri did not recall ever telling plaintiff that he would or would not be compensated for RVU codes for conscious sedation and only recalled telling the plaintiff that RVUs are applied based on the ability to bill, CPT coding restrictions, and CMS guidelines. (Appendix, Exhibit 2, pp. 74-75).

67. In response to a phone call that Steve Johnson received from plaintiff, Steve Johnson wrote a letter to plaintiff on May 17, 2010, telling him that SHMG will perform a financial analysis at the end of plaintiff's contract year, and if his productivity, expertise and overall job performance suggested that his compensation should exceed the 90th percentile, it would be presented to the Compensation Committee for consideration. (Appendix, Exhibit 1-C).

68. At the June 8, 2010 practice review, Brian Buttorff told the plaintiff that Jim Turri was not sure if the Compensation Committee would approve credit for conscious sedation because there is no reimbursement to SHMG. (Appendix, Exhibit 4, pp. 320-321; Exhibit 4-E).

69. On June 11, 2010, Steve Johnson, Ken Young, Jim Turri, Brian Buttorff, Ron Reynolds, Lori Beucler, Dr. McCauley, and Sue Duchman met with plaintiff to discuss concerns regarding the reputation that plaintiff was developing, as well as concerns regarding professionalism, documentation, recruitment, transporting medical records home, and the plaintiff's medical directorship. (Appendix, Exhibit 4, pp. 325-327; Exhibits 4-F, 4-G, 4-H).

70. Dr. McCauley discussed concerns over a patient that plaintiff had seen seven times in a little over a month and that his order sheets were sloppy creating a bad reflection on his practice. (Appendix, Exhibit 4, p. 326; Exhibit 4-F).

71. Dr. McCauley also told plaintiff that Ron Reynolds and Lori Beucler were considering terminating his medical directorship due to his lack of effectiveness and failure to act in good faith. (Appendix, Exhibit 4, p. 327; Exhibit 4-F).

72. A meeting was held on July 13, 2010, with Ron Reynolds, Lori Beucler, Dr. Manchester and plaintiff for the purpose of discussing plaintiff's performance deficits, which included his failure to perform specific duties that

were outlined in his Medical Director Contract. (Appendix, Exhibit 8, pp. 25-28; Exhibits 6-B and 6-C).

73. On July 13, 2010, plaintiff attended a meeting with Lori Beucler, Dr. Manchester, and others, where Dr. Manchester discussed plaintiff's medical directorship and told him that "it does not feel like a good fit" and noted that SHS was not required by any standards to maintain his medical directorship. (Appendix, Exhibit 4, pp. 257-259, 327-328; Exhibit 4-I).

74. Plaintiff did not dispute Dr. Manchester's statement and agreed "there should not be a struggle." (Appendix, p. 257-259; Exhibit 6-C).

75. Plaintiff recalled Reynolds talking to him about his medical directorship and telling him that he was not fit as agreed. (Appendix, pp. 327-328; Exhibits 4-I, 5-C).

76. A GI Service Line meeting was held on August 4, 2010, with plaintiff, Brian Buttorff, Heidi Campbell, Lori Beucler, and Tina Carter in attendance. (Appendix, Exhibit 4, pp. 330-336; Exhibit 4-J).

77. The minutes of the August 4, 2010 meeting reflect 12 topics that were discussed, which included staff retention, patient complaints about plaintiff's poor treatment of staff, plaintiff's lack of support for recruitment of a second GI physician, and the ongoing problem with providing documentation to referring doctors. (Appendix, pp. 330-336; Exhibit 4-J).

78. Tina Carter, Lori Beucler, Ron Reynolds, and the plaintiff met on August 13, 2010, to follow up on the medical director issues that were discussed at the July 13, 2010 meeting. (Appendix, Exhibit 9).

79. Dr. McCauley met with the plaintiff on November 1, 2010, to discuss lack of growth, the hiring of Dr. Schaeffer, and SHS's intent to terminate his Medical Directorship. (Appendix, Exhibit 3-C).

Medical Director Contract

80. Plaintiff began to inquire about employment at MHG when he heard that SHMG was going to hire another physician and SHS was going to terminate his directorship. (Appendix, p. 176).

81. SHS sent a letter on November 2, 2010, to plaintiff that notified him of its intent to terminate his Medical Director Contract effective January 31, 2011. (Appendix, 4 pg. 340; Exhibit 8-A).

82. The medical directorship paid $100 per hour billed, up to $50,000 annually. (Appendix, Exhibit 4 p. 126).

83. Plaintiff did not suffer a large reduction of pay as a result of termination of his medical directorship. (Appendix, Exhibit 4, pp. 128-130).

84. Plaintiff did not complete the forms that were required to bill for medical director hours. (Appendix, Exhibit 4, p. 129).

Incentive Compensation and Plaintiff's Memorial Hospital Efforts

85. Jim Turri sent a memo to plaintiff on December 2, 2010, titled "Incentive Compensation Due of First Contract Year (2010)," which notified him of the 2010 90th MGMA percentile for his practice group, the amount of incentive compensation that he would automatically be paid up to the 90th percentile, and the amount of incentive compensation that would go to the Compensation Committee for approval to pay above the 90th percentile in accordance with the terms of the Employment Agreement. (Appendix, Exhibit 4, pp. 340-341; Exhibit 2-F).

86. Plaintiff was automatically paid incentive compensation of $216,747 (up to the 90th percentile of $777,340).

87. Beyond the automatic incentive compensation, a request for an additional amount of incentive compensation of $160,560 was presented to and approved by the Compensation Committee. (Appendix, D-20-D-25).

88. As a result, plaintiff received a total compensation of $937,900. (Appendix, Exhibit 2, pp. 98-99; Exhibit 2-F).

89. The same day, December 2, 2010, the plaintiff received an email from Kent Nicaud, with Memorial Hospital at Gulfport, Mississippi, ("MHG"). (Appendix, Exhibit 4-K).

90. The Nicaud email was following up from a previous telephone conversation regarding prospective employment and scheduling a visit to MHG. (Appendix, Exhibit 4, p. 199; Exhibit 4-K).

91. On December 6, 2010, plaintiff asked Jim Turri to request Ken Young's opinion regarding RVU credit for conscious sedation. (Appendix, Exhibit 2, pp.100-101; Exhibit 2-G).

92. Jim Turri told the plaintiff that he sent his request to Ken Young and that based on the 2010 CPT book, appendix G:

> [I]it is not appropriate for the same physician to report both the service and the sedation codes 99143-99145. It is expected that if conscious sedation is provided to the patient as part of one of these service, it is provided by the same physician who is providing the service.

(Appendix, Exhibit 2, pp.100-101; Exhibit 2-G).

93. Plaintiff visited and interviewed at MHG on December 13, 2010. (Appendix, Exhibit 4, pp. 199, 201-202).

94. At the interview, plaintiff specifically requested that he be given a five-year contract that assigned WRVU credit for CPT codes 99144 and 99145 with no salary cap. (Appendix, Exhibit 4, pp. 245-247; Exhibit 4-L).

95. Plaintiff specifically requested as part of his contract negotiations with MHG that they start with one gastroenterologist and that there be a provision in his

contract requiring his endoscopy volumes to exceed 3,000 per year before they could hire another doctor. (Appendix, Exhibit 4, pp. 203, 245-246; Exhibit 4-K).

96. Kent Nicaud of MHG sent a Letter of Intent to Dr. Barot for his review on December 28, 2010. (Appendix, Exhibit 4-M).

97. On January 6, 2011, plaintiff emailed Kent Nicaud his 2010 salary statement from SHS. (Appendix, Exhibit 4-N).

98. Plaintiff represented in that letter that the $784,164.50 salary figure did not include production and bonuses and that CPT codes 99144 and 99145 were assigned WRVU credit. (Appendix, Exhibit 4, pp. 227-228, Exhibit 4-N).

99. Plaintiff's representation regarding his compensation was incorrect, as it did include production incentive and did not include WRVU credit for CPT codes 99144 and 99145.

100. Plaintiff has acknowledged that his base salary at the time of starting at MHG was higher than his base salary at SHMG. (Appendix, Exhibit 4, p. 188-189).

101. The practice review minutes from January 11, 2011, do not contain any mention of plaintiff telling defendants that he was considering a job at MHG. (Appendix, Exhibit 4, p. 344; Exhibit 4-O).

102. The record is devoid of any notice by plaintiff to any of the defendants that he was seeking and/or had accepted new employment at MHG before March 7, 2011.

103. On January 16, 2011 plaintiff sent an email to Kent Nicaud that said, "you were a tough negotiator, I still see fairness in you," and thanked him for recommending to the Board that they assign 84- 85.24 per WRVU. (Appendix, Exhibit 4, pp. 252-253; Exhibit 4-P).

104. In the January 16, 2011 email, plaintiff also told Kent Nicaud that assigning WRVU to CPT codes that do not currently have value is standard practice, which he based off no other experience other than his experience at SHMG which he knew was in dispute. (Appendix, Exhibit 4, pp. 253-255; Exhibit 4-P).

105. Plaintiff's first experience with a WRVU based contract was at SHMG. (Appendix, Exhibit 4, p. 255).

106. Plaintiff had his own private practice before his employment with SHMG, and he knew from his experience in private practice that Medicare did not reimburse for additional conscious sedation codes that were already bundled into another procedure, such as a colonoscopy. (Appendix, Exhibit 4, p. 255).

Acceptance of Position in Mississippi

107. On January 19, 2011, plaintiff sent an email to Kent Nicaud stating "I am pleased to accept your offer at a salary of $700,000.00 annually and 85.24 per wRVU, whichever is higher". (Appendix, Exhibit 4, pp. 206-209, 234-236; Exhibit 4-Q).

108. Plaintiff expressed his intent to enter into an employment agreement with MHG on January 19, 2011. (Appendix, Exhibit 4, p. 238 at ¶¶6-7, p. 239 at ¶22; Exhibit 4-Q).

109. In the January 19, 2011 email plaintiff stated: "What a delight it will be to work with you" ; "I am eager to join your team and make a positive contribution to the Gulfport Memorial Hospital" ; "I consider it a privilege to join your team" ; "Please consider this letter my formal acceptance." (Appendix, Exhibit 4, pp. 206-209, 241; Exhibit 4-Q).

110. Plaintiff also confirmed that the employment contract needed to include a severance provision, a promise not hire a second gastroenterologist until 3,000 endoscopies, and an agreement that WRVU credit be given for CPT codes 99144, 99145, and S0260. (Appendix, Exhibit 4, pp. 206-209; Exhibit 4-Q).

111. At the February 8, 2011 practice review, Dr. Schaefer's addition to the practice was discussed. (Appendix, Exhibit 4-R).

112. At no time during this February 8, 2011 meeting did the plaintiff mention that he was considering other employment. (Appendix, Exhibit 4, pp. 345-346; Exhibit 4-R).

113. Plaintiff testified that he did not tell defendants about the emails he exchanged with Kent Nicaud at MHG indicating his formal acceptance of employment, because "[he] had no intention to leave. [He] was exploring the possibility only if [defendants] [did] not cure the breach, so [he] did not find the need to discuss something which [he] never wanted to do." (Appendix, Exhibit 4, p. 346 at ¶¶13-16; Exhibit 4-R).

114. On February 21, 2011, plaintiff signed various MHG employment documents, which included authorizations for complete credit history and background checks, and electronic media use and confidentiality agreements. (Appendix, Exhibit 4, pp. 248-250; Exhibit 4-S).

115. Plaintiff signed an MHG medical staff application on February 22, 2011. (Appendix, Exhibit 4, pp. 250-251; Exhibit 4-T).

116. On February 22, 2011, plaintiff wrote an email to Kent Nicaud that stated "my application is ready. Rodger is working on contract." (Appendix, Exhibit 4, p. 244; Exhibit 4-U).

117. Attorney Rodger Wilder represented plaintiff in his contract negotiations with MHG. (Appendix, 4, pp. 244-245).

118. Attorney Lovecchio also assisted plaintiff with the MHG contract negotiations. (Appendix, Exhibit 4, pp. 244-245).

119. Plaintiff exchanged additional emails with Kent Nicaud on February 22, 2011, which further confirmed plaintiff's specific requests and advice from counsel regarding the specific terms that he wanted included in the MHG contract. (Appendix, Exhibit 4, pp. 245-247; Exhibit 4-L).

Continuing Medical Education and Staff Hiring Issues

120. Plaintiff admitted that he was allowed to attend CMEs when he was employed by SHMG, and he could only recall his request being denied once. (Appendix, Exhibit 4, pp. 111-112, 116).

121. Plaintiff alleged that he asked SHMG multiple times if he could attend the CME, but they never gave him a reason for their denial. (Appendix, Exhibit 4, p. 117).

122. Plaintiff's request to attend a CME which was initially denied, then later granted, was a request to attend within the last two weeks of his employment, making his last day physically worked for SHMG prior to the date of the CME. (Appendix, 7-C).

123. Brian Buttorff sent an email to the plaintiff on May 3, 2011, stating that SHMG has reconsidered his request to attend the CME and that his request was granted. (Appendix, 7-B).

124. Plaintiff did not recall having to work with any employee, except Dr. Schaefer, that he did not have the opportunity to participate in their interview. (Appendix, Exhibit 4, p. 122).

125. Plaintiff requested attendance at a continuing education course ("CME") within the last two weeks of his employment, and this request was granted by SHMG. (Appendix, Exhibit 7C).

Events – March, 2011 through May, 2011

126. On March 7, 2011, plaintiff, through legal counsel, sent a Letter of Notice of Intent to Terminate his Employment Agreement with SHMG within 90 days and he asserted allegations of breach. (Appendix, Exhibit 4, pp. 239, 348-352; Exhibit 4-V).

127. The March 7, 2011 letter providing the initial notice of intent to terminate did not identify either his later claims of improper denial of continuing medical education or failure to include plaintiff in the hiring process as breaches of contract.

128. Plaintiff cannot identify any document prior to the March 7, 2011 that puts defendants on notice of his allegations of breach. (Appendix, Exhibit 4, p. 349).

129. On March 9, 2011, plaintiff withdrew his March 7, 2011 letter providing notice of breach. (Appendix, Exhibit 4, p. 354; Exhibit 4-W).

130. The SHMG Compensation Committee met on March 10, 2011, to discuss plaintiff's initial request for excess compensation above the 90^{th} MGMA percentile.

131. The Committee approved an additional compensation payment of $160,500.00, which was calculated from WRVUs that did not include additional codes for conscious sedation. (Appendix, Exhibit 2, pp. 108-113, 124; Appendix, Exhibit 1, June 30, 2016, p. 35; Exhibit 1-D).

132. The Compensation Committee had the discretion to partially approve a request for compensation in excess of the 90^{th} percentile, and the entirety of the plaintiff's request for compensation did not have to be granted. (Exhibit 1, June 30, 2016, p. 35).

133. Jim Turri sent an email to plaintiff informing him of the Compensation Committee's approval of additional incentive compensation of $160,500.00. (Appendix, Exhibit 4, pp. 228-229).

134. Plaintiff forwarded that email to Kent Nicaud at MHG on March 14, 2011. (Appendix, Exhibit 4, pp. 228-229).

135. A practice review was held on April 12, 2011, where plaintiff stated for the first time to the defendants that he was leaving and going to Mississippi and that he would honor the date he discussed with Jim Turri. (Appendix, Exhibit 4, pp. 360-361; Exhibit 4-Y).

136. On April 15, 2011, plaintiff, through legal counsel, sent another Letter of Notice of Intent to Terminate his Employment Agreement with SHMG, but this time he made allegations of material breach, only provided 30 days' notice, and added a new allegation of discrimination. (Appendix, Exhibit 4, pp. 357-359; Exhibit 4-Y).

137. The April 15, 2011 letter providing notice to terminate did not identify either his later claims of improper denial of continuing medical education or failure to include plaintiff in the hiring process as breaches of contract.

138. Brian Buttorff sent a memo to plaintiff on May 2, 2011, regarding plaintiff's recent request for PTO and CME time off. (Appendix, Exhibit 7; Exhibit 7-B).

139. The SHMG Compensation Committee met on May 12, 2011, to discuss plaintiff's request for compensation in excess of the 90th percentile for RVU credit for additional codes for conscious sedation. (Appendix, Exhibit 2, pp. 117-119; Exhibit 2-I).

140. The Committee determined that it could not justify as reasonable, the additional request for compensation. (Appendix, Exhibit 2, pp. 117-119; Exhibit 2-I).

141. There was no discussion of plaintiff's letter of resignation at the May 12, 2011 Compensation Committee meeting (Appendix, Exhibit 1, June 24, 2015, p. 40; Exhibit 10; p. 37; Exhibit 11, p. 23, Exhibit 2-I).

142. Conscious sedation is administered by an injection which is given by a nurse, and not given by plaintiff. (Appendix, Exhibit 4, p. 222).

143. Plaintiff's last day of employment was May 15, 2011.

144. Plaintiff signed an employment agreement with MHG on May 1, 2011. (Appendix, Exhibit 4-Z).

145. SHMG sent a letter to plaintiff on May 31, 2011, informing him of the Compensation Committee's decision to deny his second request for additional compensation above the 90th percentile. (Appendix, Exhibit 4-AA).

No Evidence of Bad Faith

146. There is no evidence in the record to reflect that the Compensation Committee or defendants acted in bad faith.

147. There is no evidence in the record to reflect that the Compensation acted arbitrarily or capriciously.

148. Plaintiff's RVU bonus at MHG for contract year May 1, 2013 to April 30, 2014, was $1.4 million, resulting in a total annual gross income of $2.1 million. (Appendix, Exhibit 4, pp. 219-220).

McCORMICK LAW FIRM

By: /s/ J. David Smith
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic services are being served with a copy of this document via the Court's CM/ECF system.

McCORMICK LAW FIRM

By: /s/ J. David Smith

Date: January 31, 2017